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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JOHN SMITH, individually and as
a representative of the Class,

Plaintiff,

v.

A-CHECK AMERICA INC. d/b/a
A-CHECK GLOBAL,

Defendant.

Case No.: 5:16-cv-00174-VAP-KK

**PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES, COSTS,
AND CLASS
REPRESENTATIVE SERVICE
PAYMENTS AND
MEMORANDUM IN SUPPORT**

Date: July 10, 2017

Time: 2:00 p.m.

Location: Courtroom 8A, 8th Floor

Judge: Hon. Virginia A. Phillips

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on July 10, 2017, at 2:00 p.m. in Courtroom 8A on the 8th floor, at First Street Courthouse, 350 West First Street, Los Angeles, California, the Honorable Virginia A. Phillips presiding, Plaintiff John Smith and Class Counsel will respectfully move the Court to award one-third of the Settlement Fund (\$133,333.33) in attorneys' fees, \$17,224.22 to reimburse Counsel for out-of-pocket, documented expenses, \$3,500 as a service payment to the Named Plaintiff, and settlement administration expenses to be determined at the Final Approval hearing.

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Fed. R. Civ. P. 23(h)	1
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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(h), and in accordance with the Court's Preliminary Approval order (ECF No. 59), Plaintiff John Smith ("Plaintiff") and Class Counsel seek approval of an award of one-third of the Settlement Fund (\$133,333.33) in attorneys' fees, \$17,224.22 to reimburse Counsel for out-of-pocket, documented expenses, \$3,500 as a service payment to the Named Plaintiff, and settlement administration expenses to be demined at the Final Approval hearing. In its preliminary approval order, the Court did a preliminary evaluation of the requested fee, but concluded that it lacked information regarding several important factors. (ECF No. 59). This briefing is designed to supply the information that the Court noted was absent.

Compared to the results in similar matters, the results obtained in this case are impressive, and the risks that Counsel overcame to reach them were significant. Further, the fee requested in this case is just over *half* of Counsel's lodestar. The risks that Counsel undertook in this case, accompanied by the fact that Counsel seeks a less than full recovery of fees, justify a departure from this Court's benchmark rate of 25% and the award of one-third of the fund in fees.

II. STATEMENT OF THE ISSUE TO BE DECIDED

Whether the requested attorneys' fees, expenses, and service payments are reasonable and should be awarded.

III. BACKGROUND

RELEVANT FACTS

A. THE PARTIES ENGAGED IN LITIGATION, FORMAL AND INFORMAL DISCOVERY, AND MEDIATION BEFORE REACHING THIS SETTLEMENT

1. Procedural History

Prior to reaching the Settlement Agreement in this matter, this case was

1 very actively litigated, with Counsel's lodestar nearly doubling the fee
2 requested here. On December 3, 2015, Plaintiff Smith filed his proposed class
3 action against A-Check in the Superior Court of the State of California. On
4 January 29, 2016, A-Check removed the lawsuit to this Court. On February 17,
5 2016, Plaintiff filed his First Amended Complaint ("FAC"). (ECF No. 15.) On
6 behalf of himself and the proposed class, Plaintiff Smith sought statutory
7 damages of between \$100 and \$1000 per violation, plus attorneys' fees, costs,
8 and all other available relief. (*Id.*) Defendant moved to dismiss the FAC, a
9 motion the Court denied. (ECF Nos. 28, 35.) Defendant filed its Answer on
10 May 6, 2016. (ECF. No. 36.)

11 During the litigation, the parties exchanged numerous pieces of
12 information through both formal and informal discovery. In formal discovery,
13 both parties produced hundreds of pages of documents, and Plaintiff also
14 received significant discovery from a third party subpoena directed at an
15 industry organization. (Hashmall Dec., ¶ 4.) Additionally, Plaintiff deposed
16 Defendant's Rule 30(b)(6) designee. (*Id.*) In advance of mediation, the parties
17 also worked cooperatively to exchange information regarding how
18 Defendant's electronic systems could be queried to identify members of the
19 classes. (*Id.*) In service of this effort, the parties engaged in numerous
20 conference calls, some of which included technical consultants advising the
21 parties on how best to extract information from Defendant's databases. (*Id.*)

22 On December 1, 2016, the parties attended a full-day mediation. Prior
23 to this successful mediation, both parties prepared mediation briefs indicating
24 their positions on the merits of Plaintiff's claims and on an appropriate
25 settlement value and structure. (Hashmall Decl., ¶ 5.) Defendant provided a
26 detailed account of how it had identified putative class members in its
27 databases and Plaintiff reviewed that methodology. The mediation, conducted

1 by Joan Kessler, an experienced third-party mediator, culminated in both
2 parties signing a binding terms sheet, which served as the basis for the instant
3 Settlement Agreement. (*Id.*)

4 **2. Summary of Plaintiff's Settled Claims Against**
5 **Defendant**

6 All the settled claims relate to background checks that Defendant
7 produced on job applicants. As expressed in the First Amended Complaint
8 (ECF No. 15.), the FCRA prohibits a consumer reporting agency ("CRA" or
9 "agency") from including non-conviction adverse information older than
10 seven years.

11 Plaintiff Smith alleged that Defendant violated the FCRA by producing
12 a background report that included information relating to non-convictions that
13 predated the report by more than seven years. Defendant denies any liability
14 for these claims.

15 These claims were far from risk-free. A substantially similar case
16 recently was dismissed on jurisdictional grounds, and serious challenges have
17 been raised to 1681c claims on First Amendment grounds. See *Schartel v. One*
18 *Source Tech., LLC*, No. 1:15 CV 1434, 2016 WL 6024558, (N.D. Ohio Oct.
19 14, 2016) (dismissing case); *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d
20 303 (E.D. Pa. 2012) (discussing 1681c and First Amendment). More
21 generally, there simply are not very many practitioners doing cases of this type,
22 and relatively little precedent.

23 To avoid the further costs and burdens of litigation, the parties have
24 agreed to settle the claims. The proposed Settlement Class consists of the
25 approximately 2,717 persons who Defendant has identified as (1) having been
26 the subject of a background report prepared by A-Check, (2) whose
27 background report contained one or more items of criminal information which

1 were non-convictions predating the report by more than seven years, and (3)
 2 whose report was issued at any time dating from February 17, 2014 to the date
 3 of the Settlement Agreement, January 27, 2017. (Settlement Agreement, ¶ 27.)

4 The Settlement Class Members will release only claims that were or
 5 could have been raised in this litigation, namely all claims arising under 15
 6 U.S.C. § 1681c of the FCRA and state law analogs.

7 **3. Settlement Negotiations**

8 On December 1, 2016, the parties engaged in a full day of vigorous,
 9 arm's-length negotiations in a mediation with Joan Kessler. At the conclusion
 10 of this mediation, the parties reached an agreement as to the material terms of
 11 a settlement. While the parties negotiated the case, the parties did not negotiate
 12 any terms relating to attorneys' fees for Plaintiff's Counsel or incentive awards
 13 for the Named Plaintiff until after all other material terms were agreed upon.
 14 (Settlement Agreement, ¶ 36-37.) The material terms of the Settlement were
 15 reduced to a terms sheet signed at the conclusion of mediation. In negotiations
 16 over subsequent weeks, a full Settlement Agreement was reached and
 17 executed.

18 **B. THE PARTIES' SETTLEMENT AGREEMENT**

19 **1. Overview of Terms and Settlement Administration**

20 In consideration for the release of the Settlement Class Members'
 21 claims, A-Check has, first, implemented an automated process to screen out
 22 information that should not be reported under 15 U.S.C. § 1681c. (Settlement
 23 Agreement, ¶ 30.) Defendant agrees to keep this process in place for at least
 24 two years after the Settlement's Effective Date unless the Defendant believes
 25 in good faith that a change in existing law warrants a departure from this
 26 practice.

27 Second, Defendant has implemented procedures to ensure that criminal
 28

1 charges which are dismissed due to amendment prior to conviction are no
2 longer reported after seven years. (Settlement Agreement, ¶ 31.) Defendant
3 agrees to keep this process in place for at least two years after the Settlement's
4 Effective Date unless the Defendant believes in good faith that a change in
5 existing law warrants a departure from this practice.

6 Third, Defendant agrees to provide Class Members who request a copy
7 of their background report with a copy, free of charge. (Settlement Agreement,
8 ¶ 32.) The benefit of these three non-monetary provisions is substantial both
9 for Settlement Class Members and future applicants for employment who have
10 their background reports prepared by A-Check.

11 Finally, A-Check will deposit the Gross Settlement Amount ("GSA") of
12 \$400,000 with the Settlement Administrator for the benefit of the Class.
13 (Settlement Agreement, ¶ 33.)

14 After the deductions for any Court-awarded attorneys' fees, litigation
15 expenses, settlement administration costs, and Named Plaintiff service award,
16 this fund will be distributed to all Settlement Class Members who do not opt
17 out. (Settlement Agreement, ¶ 20.) Defendant, in assembling the class list,
18 shall note which Settlement Class Members had outdated information related
19 to criminal charges on their reports, and which Settlement Class Members had
20 only outdated information related to traffic offenses on their reports. The net
21 settlement fund shall be distributed to Settlement Class Members such that
22 individuals with any outdated criminal charges on their reports shall receive a
23 payment four times greater than those with only outdated traffic violations on
24 their reports. (*Id.* ¶ 35.)

25 If settlement checks are not cashed, those funds will be donated to the
26 *cy pres* recipient, the Southern Center for Human Rights in Atlanta, subject to
27 Court approval. (Settlement Agreement, ¶¶ 15, 39.) No portion of the

1 settlement fund will revert to the Defendant in any circumstance. (*Id.* ¶ 34.)

2 **2. Reaction of Settlement Class Members to the** 3 **Settlement**

4 On April 7, 2017, the Settlement Administrator mailed Notice to 2,668
5 Settlement Class Members in accordance with the procedures outlined in the
6 Settlement Agreement. On the same date, the Settlement Administrator also
7 activated the Settlement Website, www.backgroundchecksettlement.com, and
8 a toll-free telephone line for Class Members to use. As of May 8, 2017, there
9 have been zero opt-outs and zero objections received. The postmark deadline
10 for opt-outs and objections is May 22, 2017. As settlement administration
11 activities are far from finished, the Administrator will submit a declaration in
12 conjunction with the final approval motion which spells out more fully its
13 activities in administering the settlement, as well as its precise requested fee.
14 The Administrator's fee is not expected to exceed \$26,000.

15 **3. Class Counsel's Fees and Costs to Date**

16 To date, Berger & Montague, P.C. has incurred \$15,225.50 in costs and
17 \$187,496.10 in lodestar. (Hashmall Decl. ¶¶ 9, 11.) Nichols Kaster, PLLP has
18 incurred \$1,998.72 in costs and \$46,285.00 in lodestar. (*Id.*, ¶¶ 7, 11.) The
19 Tatar Law Firm has incurred \$4,547.50 in lodestar. (*Id.*, ¶ 12.)

20 The requested awards are one-third of the Settlement Fund as attorneys'
21 fees (\$133,333.33), and reimbursement of total out-of-pocket expenses in the
22 amount of \$17,224.22, not including the Settlement Administrator's expenses.
23 The requested fees award results in a 0.56 multiplier of Class Counsel's
24 cumulative lodestar to date, which, as outlined below, weighs strongly in favor
25 of the requested amount.

26 **IV. ARGUMENT**

1 grounds, 772 F.3d 608 (9th Cir. 2014).

2 Here, the parties' Settlement Agreement, which was negotiated under
3 adversarial and non-collusive circumstances, provides for a reasonable award
4 of attorneys' fees of up to one-third of the Settlement Fund and reimbursement
5 of out-of-pocket costs, and those fees and costs should be approved.

6 **1. The Proportion of the Settlement Fund Requested**
7 **(One-Third) Is Reasonable**

8 The Ninth Circuit has approved two methods of assigning attorneys'
9 fees in common fund cases: the "percentage of the fund" method and the
10 "lodestar" method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.
11 2002) (citing *In re. Wash. Pub. Power Supply*, 19 F.3d at 1295-96). Under the
12 percentage method, the court may award class counsel a percentage of the
13 common fund recovered for the class. (*Id.*) The percentage method is
14 particularly appropriate in common fund cases, because "the benefit to the
15 class is easily quantified." *In re Bluetooth Headset Prods. Liab. Litig.*, 654
16 F.3d 935, 942 (9th Cir. 2011). The Ninth Circuit's approved "benchmark"
17 percentage is 25%. (*Id.*) (quoting *Six (6) Mexican Workers v. Ariz. Citrus*
18 *Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). However, courts in this Circuit
19 often award even more than the benchmark percentage. *See Knight v. Red*
20 *Door Salons, Inc.*, No. 08-cv-1520, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2,
21 2009) ("in most common fund cases, the award exceeds [the] benchmark");
22 *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989)
23 ("nearly all common fund awards range around 30%"); *In re Pac. Enters. Sec.*
24 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of
25 fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827, 2013 WL
26 149692 (N.D. Cal. Jan. 14, 2013) (30%).

When analyzing a fee request under the percentage method, courts in this Circuit look at: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by the class counsel; and (6) the awards made in similar cases. (ECF No. 59 at 18.) Applied here, all of these factors support Class Counsel's request for one-third of the Settlement Fund.

a. The Monetary and Non-Monetary Results Obtained Are Significant and Impressive

Plaintiff and Class Counsel achieved a noteworthy result in this matter, especially in light of the relatively small individual amounts at issues (the FCRA provides for statutory damages of \$100 - \$1,000). The monetary relief achieved for the Settlement Class will result in payments of approximately \$116 for the 1,864 Class Members with criminal records on their reports, and approximately \$29 for the 800 Class Members with only traffic infractions on their reports.¹

In the preliminary approval order, the Court correctly noted that the average award is below the minimum statutory recovery of \$100. (ECF No 59 at 18 (noting average per Class Member recovery of \$88).) However, this means that if Plaintiff had prevailed on a contested class certification motion and at summary judgment or trial, all of these efforts might have only resulted in an additional \$12 per Class Member, on average. This settlement, at this phase in the proceedings, is an impressive result. This is especially true when this case is compared with similar settlements of 1681c cases. *See, e.g., King*

¹ In the preliminary approval briefing, Plaintiff noted that the per-class-member recovery could not be estimated until the relative proportion of the class with criminal, rather than traffic, charges on their reports was known. (ECF No 56 at 19 n. 2.) The estimates above reflect the fact that this proportion is now known. However, the final amounts will depend on the number of opt-outs, as well as other factors.

1 *v. Gen. Info. Serv., Inc.*, No. 10-cv-6850, ECF No. 125 (E.D. Penn. Nov. 4,
 2 2014) (final approval of settlement of claims that Defendant reported outdated
 3 non-conviction information, payments of approximately \$49 net per Class
 4 Member); *Ernst v. Sterling Infosystems, Inc.* No. 12-cv-8794, ECF No. 237
 5 (S.D.N.Y. Oct. 13, 2015) (final approval of settlement that provided payments
 6 of \$42 to \$61 per class member for reporting obsolete information). This result
 7 is particularly impressive when considered in light of the litigation risks,
 8 discussed below, and the similar cases where the class received no recovery,
 9 because the case was dismissed. *See, e.g., Schartel*, No. 1:15 CV 1434, 2016
 10 WL 6024558.

11 Further, the settlement provides substantive non-monetary relief that
 12 directly addresses the claims at issue in the case. (*See supra* § III.B.1.) Given
 13 that there is a disagreement about whether injunctive relief is even available to
 14 private plaintiffs under the FCRA, the non-monetary relief in particular is
 15 remarkable, and may achieve more for Class Members than could have ever
 16 been achieved in litigation. *See Gauci v. Citi Mortg.*, No. 11-cv-01387, 2011
 17 WL 3652589, at *3 (C.D. Cal. Aug. 19, 2011) (“District courts in the Ninth
 18 Circuit agree that a private party may not obtain injunctive relief under the
 19 FCRA.”). For some Class Members (and members of the public), the
 20 injunctive relief could make the difference in a future job application,
 21 rendering it significantly more valuable than the monetary relief in this case.

22 **b. Class Counsel Assumed Significant Risks in this Complex** 23 **Litigation**

24 The requested fee award is even more reasonable considering the
 25 complexity of the litigation, and the risks that Class Counsel assumed in
 26 undertaking the representation on a contingent-fee basis. Class action litigation
 27 is inherently complicated and time-consuming. On top of the demands that

1 come with this type of litigation, Class Counsel also had to be prepared to
 2 make this investment with the very real possibility of an unsuccessful outcome
 3 and no fee recovery of any kind. The Ninth Circuit has recognized the
 4 importance of rewarding attorneys who take cases on a contingency basis. *In*
 5 *re Wash. Pub. Power Supply*, 19 F.3d at 1299 (“[c]ontingent fees that may far
 6 exceed the market value of the services if rendered on a non-contingent basis
 7 are accepted in the legal profession as a legitimate way of assuring competent
 8 representation for plaintiffs who could not afford to pay on an hourly basis
 9 regardless whether they win or lose.”); *see also Graham v. DaimlerChrysler*
 10 *Corp.*, 101 P.3d 140, 157(Cal. 2004) (“[a] contingent fee must be higher than
 11 a fee for the same legal services paid as they are performed. The contingent
 12 fee compensates the lawyer not only for the legal services he renders but for
 13 the loan of those services.”) (internal citations omitted).

14 Here, there were risks in this case not taken into account in the Court’s
 15 preliminary approval order. (ECF No. 59 at 18.) In addition to the risk
 16 discussed by the Court, there was real risk associated with bringing class
 17 claims for violation of 15 U.S.C. § 1681c. The recent Supreme Court Decision
 18 in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) has lead defendants in FCRA
 19 actions to challenge the plaintiff’s standing under Article III. While several
 20 courts, including one in this state, have found that standing exists in a FCRA
 21 class action seeking statutory damages for violation of § 1681c, at least one
 22 court has found otherwise. *Compare Hawkins v. S2Verify*, No. C 15-03502
 23 WHA, 2016 WL 3999458, at *5–6 (N.D. Cal. July 26, 2016) *and Gambles v.*
 24 *Sterling Infosystems, Inc.*, 15-cv-9746, ECF No. 72 (S.D.N.Y. Feb. 13, 2107)
 25 (finding standing) with *Schartel v. One Source Tech., LLC*, No. 1:15 CV 1434,
 26 2016 WL 6024558 (dismissing § 1681c putative class action for lack of Article
 27 III standing). The jurisdictional risk in this case was very real.

1 These risks were compounded by constitutional arguments Defendants
2 have made in other similar cases, including First Amendment arguments. *See*
3 *King*, 903 F. Supp. 2d at 303 (discussing 1681c and First Amendment).

4 All of this was in addition to the need to establish Defendant's alleged
5 violation was willful in order to obtain statutory damages for the class. 15
6 U.S.C. § 1681n. These risks were compounded by all of the other risks that
7 come with class litigation, including the need to certify a class, prevail on
8 dispositive motions, and to prevail at trial.

9 **c. Counsel's Experience Skill, and Quality of Work**

10 Class Counsel are highly experienced in complex class action litigation
11 and consumer litigation in general. (*See* ECF No. 53-3.) Berger & Montague,
12 P.C. was founded in 1970, and has been concentrated on representing plaintiffs
13 in complex class actions ever since. (*Id.*) The firm has been recognized by
14 courts for its skill and experience in handling major complex litigation. (*Id.*)
15 Berger has been recognized by The National Law Journal in 11 of the last 15
16 years for its "Hot List" of top plaintiffs' oriented litigation firms in the nation.
17 (*Id.*).

18 Class Counsel's substantial litigation skills were necessary to bring this
19 action to a successful conclusion. Counsel not only defeated Defendant's
20 motion to dismiss, they thoroughly investigated Plaintiff's claims, analyzed
21 documents and data and used them to Plaintiff's advantage at settlement
22 negotiations, and ultimately settled this matter on terms that are highly
23 favorable to the Settlement Class.

24 This action was vigorously litigated by both sides before the parties
25 settled. As described above in the Background section, the parties engaged in
26 motion practice, discovery, detailed analysis of data provided by Defendant,
27

1 and informed settlement negotiations. Given the time devoted to litigating and
2 settling this action, this factor weighs in favor of the requested award.

3 **d. Contingent Nature of the Fee**

4 Counsel took this matter on a purely contingent basis. (Hashmall Dec.,
5 ¶ 15.) To date, Counsel has received no compensation in this matter, and has
6 advance all costs of litigation. (*Id.* ¶¶ 16, 17.) If this case had been
7 unsuccessful, Counsel would have received no compensation. (*Id.* ¶ 15.) This
8 factor weighs strongly in favor of the modest fee requested in this case.

9 **e. The Burden Carried By Counsel, and Class Counsel's**
10 **Lodestar, Weigh Strongly in Factor of the Fee Request.**

11 In this case, not only have Counsel advanced all litigation costs, but
12 Counsel have invested far more time in this case than they are requesting
13 compensation for. The lodestar comparison confirms this. *See Vizcaino*, 290
14 F.3d at 1050 (“the lodestar calculation can be helpful in suggesting a higher
15 percentage when litigation has been protracted”). The “cross-check calculation
16 need entail neither mathematical precision nor bean counting . . . [courts] may
17 rely on summaries submitted by the attorneys and need not review actual
18 billing records.” *Covillo v. Specialty's Café*, No. 11-cv-594, 2014 WL 954516,
19 at *21-22 (N.D. Cal. Mar. 6, 2014) (quoting *In re Rite Aid Corp. Sec. Litig.*,
20 396 F.3d 294, 306-7 (3d Cir. 2005)).

21 The lodestar method is calculated by multiplying “the number of hours
22 . . . reasonably expended on the litigation . . . by a reasonable hourly rate.” *In*
23 *re Bluetooth Headset*, 654 F.3d at 941. In considering rates, courts examine
24 the rate “prevailing in the community for similar services by lawyers of
25 reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, 465
26 U.S. 886, 895 n.11 (1984). Here, Class Counsel's hourly rates are comparable
27 to those approved in this District, and in California in general. *See In re*

1 *Magsafe Apple Power Adapter Litig.*, No. 09-cv-1911, 2015 WL 428105, at
 2 *12 (N.D. Cal. Jan. 30, 2015) (“In the Bay Area, reasonable hourly rates for
 3 partners range from \$560 to \$800, for associates from \$285 to \$510, and for
 4 paralegals and litigation support staff from \$150 to \$240”) (citing cases); *see*
 5 *also Bohannon v. Facebook, Inc.*, No. 12-cv-1894, 2016 WL 2962109, at *5-
 6 6 (N.D. Cal. May 23, 2016) (approving attorney hourly rates of \$525-800); *In*
 7 *re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 591-92 (N.D. Cal. 2015)
 8 (approving attorney rates from \$335 - 685); *Klee v. Nissan N. Am., Inc.*, No.
 9 12-cv-08238, 2015 WL 4538426, at *13 (C.D. Cal. July 7, 2015) (approving
 10 rates of \$370 to \$695); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d
 11 1160, 1172 (C.D. Cal. 2010) (approving rates of \$445 – 675).

12 Class Counsel’s detailed fee records are attached to the Hashmall
 13 Declaration, with redactions for privilege. (Hashmall Decl., Exs. A-D.) To
 14 date, Counsel’s cumulative lodestar is \$238,328.60. (Hashmall Decl., ¶ 12.)
 15 The lodestar cross-check of the percentage requested thus results in a
 16 multiplier of 0.56. That is, awarding the full amount requested will result in
 17 Counsel being paid just over *half* their hourly rate. This strongly supports the
 18 requested fee. *Schiller v. David's Bridal, Inc.*, No. 1:10-CV-00616-AWI, 2012
 19 WL 2117001, at *23 (E.D. Cal. June 11, 2012) (awarding one-third of the fund,
 20 when award would be less than counsel’s lodestar); *Chun-Hoon v. McKee*
 21 *Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (“multiplier of less
 22 than one, (sometimes called a negative multiplier) suggests that the negotiated
 23 fee award is a reasonable and fair valuation of the services rendered to the class
 24 by class counsel.”); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138
 25 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007); *Rosado v. Ebay*
 26 *Inc.*, No. 5:12-CV-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21,
 27 2016)

1 The requested multiplier of 0.56 is significantly less than is commonly
 2 awarded in this Circuit. *See Vizcaino*, 290 F.3d at 1051, n. 6 (finding that in
 3 approximately 83% of cases surveyed by the court, the multiplier was between
 4 1.0 and 4.0 and affirming a multiplier of 3.65); *McIntosh v. McAfee, Inc.*, No.
 5 06-cv-7694, 2009 WL 673976, at *2 (N.D. Cal. 2009) (recognizing a range
 6 from “2 to 4 or even higher”); *Van Vranken v. Atlantic Richfield Co.*, 901 F.
 7 Supp. 294, 298 (N.D. Cal. 1995) (“[m]ultipliers in the 3-4 range are
 8 common”).

9 The lodestar cross-check thus strongly supports the reasonableness of
 10 the requested fee award.

11 **f. Awards In Similar Cases Support The Requested Fee**

12 The requested award is supported by the awards in similar class cases,
 13 both in and out of the Ninth Circuit. *King v. Gen. Info. Serv., Inc.*, No. 10-cv-
 14 6850, ECF No. 126 (E.D. Penn. Nov. 4, 2014) (awarding counsel one-third of
 15 fund in 1681c class action); *Ford v. CEC Entm't Inc.*, No. 14CV677 JLS (JLB),
 16 2015 WL 11439033, at *1 (S.D. Cal. Dec. 14, 2015) (awarding fee of one-third
 17 in FCRA class action); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-
 18 BR, 2006 WL 3312024, at *1 (D. Or. Nov. 13, 2006) (awarding 30% in FCRA
 19 class action).

20 **g. The Reaction of the Class To Date is Positive**

21 Notice of the settlement, including the proposed amounts to be
 22 requested in fees, costs, and service payments, was emailed on April 7, 2017
 23 to the class. Not a single Class Member has filed an objection to the requested
 24 fee award to date, and none have opted out. (Hashmall Decl., ¶ 20.) This factor
 25 supports the requested award. *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D.
 26 431, 448 (E.D. Cal. 2013) (finding only one opt-out and zero objections from
 27 1,837 class members weighed in favor of awarding 33% of the common fund);

1 *Razilov v. Nationwide Mut. Ins. Co.*, 2006 WL 3312024 at *3 (finding 27 opt-
 2 outs out of 60,000 class members weighed in favor of granting fee award in
 3 excess of 25% benchmark); *Thieriot v. Celtic Ins. Co.*, No. 10-cv-4462, 2011
 4 WL 1522385, at *6 (N.D. Cal. April 21, 2011) (“[t]he fact that no members of
 5 the 390-person class objected to the proposed 33% fee award —which was
 6 also communication in the notice — supports an increase in the benchmark
 7 rate.”).

8 **2. Class Counsel’s Litigation Costs Are Recoverable**

9 Class Counsel also seek, and Defendants do not oppose, reimbursement
 10 of documented out-of-pocket expenses incurred in litigating and settling this
 11 matter. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should
 12 recover “those out-of-pocket expenses that would normally be charged to a fee
 13 paying client”) (internal citations omitted); *Ashker v. Sayre*, No. 05-cv-3759,
 14 2011 WL 825713, at *3 (N.D. Cal. Mar. 7, 2011) (finding “costs of
 15 reproducing pleadings, motions and exhibits are typically billed by attorneys
 16 to their fee-paying clients” and are thus reimbursable); *Trustees of Const.*
 17 *Indust. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d
 18 1253, 1258-59 (9th Cir. 2006) (legal research costs reimbursable); *In re*
 19 *Immune Response Secs. Litig.*, 497 F. Supp. 2d 1166, 1177-8 (S.D. Cal. 2007)
 20 (mediation expenses, expert fees, legal research, copies, postage, filing fees,
 21 messenger, and federal express costs reimbursable); *Marhoefer*, 24 F.3d at 19
 22 (postage costs reimbursable).

23 As Counsel’s expense records show, all of the costs incurred were
 24 reasonable and necessary to the successful conclusion of this litigation. (*See*
 25 *Hashmall Decl.*, Exs. C-D.) These costs include: filing fees, legal research,
 26 service of process, expert fees, deposition and mediation expenses, and FedEx
 27 costs. These types of expenses are routinely reimbursed by the courts as noted

1 above, thus Counsel’s requested costs of \$17,224.22 should be awarded.

2 **B. THE REQUESTED SERVICE PAYMENT IS APPROPRIATE**

3 The Ninth Circuit has recognized that named plaintiffs are eligible for
 4 reasonable service awards. *Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 958
 5 (9th Cir. 2009) (service awards “are fairly typical in class action cases.”). Such
 6 awards are intended to compensate class representatives for work done on
 7 behalf of the class, to make up for financial or reputational risk undertaken in
 8 bringing the action, and to recognize their willingness to act as private
 9 attorneys general. (*Id.* at 958-59.)

10 In evaluating requests for service awards, the court should consider
 11 “relevant factors including ‘the actions the plaintiff has taken to protect the
 12 interests of the class, the degree to which the class has benefitted from those
 13 actions, . . . [and] the amount of time and effort the plaintiff expended in
 14 pursuing the litigation.’” *Thieriot*, 2011 WL 1522385 at *7 (quoting *Staton*, 327
 15 F.3d at 977). Here, all of these factors support the requested awards. Plaintiff
 16 has expended significant time and effort in this matter, consistently putting the
 17 Class Members’ interests first. Plaintiff provided documentation regarding his
 18 experiences with Defendant, was prepared to travel and sit for depositions,
 19 stayed abreast of developments in the case, and evaluated the Settlement
 20 Agreement. (Hashmall Decl. ¶ 4.) As a result of Plaintiff’s efforts, and his
 21 willingness to pursue this action, substantial benefits have been achieved on
 22 behalf of the Settlement Class.

23 Moreover, the requested service payments of \$3,500 to Plaintiff is
 24 relatively modest compared to awards granted in other complex litigation in
 25 this Circuit. *See, e.g., Razilov*, 2006 WL 3312024 at *2-4 (approving incentive
 26 award of \$10,000); *Ralston v. Mortg. Inv’rs Grp., Inc.*, No. 08-cv-536, 2013
 27 WL 5290240, at *5 (N.D. Cal. Sept. 19, 2013) (approving service payment of

1 \$12,500); *In re Netflix Privacy Litig.*, No. 11-cv-379, 2013 WL 1120801, at
2 *11 (N.D. Cal. March 18, 2013) (approving service awards of \$6,000 for each
3 named plaintiff); *Vedachalam v. Tata Consultancy Servcs. Ltd.*, No. 06-cv-
4 0963, 2013 WL 3929129, at *7 (N.D. Cal. July 18, 2013) (approving service
5 awards of \$25,000 and \$35,000).

6 Accordingly, the service awards are fully justified, reasonable, and
7 should be awarded.

8 **V. CONCLUSION**

9 Based on the foregoing, Plaintiff respectfully requests that the Court
10 grant Class Counsel's requested awards of \$133,333.33 as attorneys' fees,
11 \$17,224.22 in costs, a service payment to the Plaintiff of \$3,500, and
12 settlement administration expenses to be demined at the Final Approval
13 hearing.

14
15
16 BERGER & MONTAGUE, P.C.

17 Dated: May 8, 2017

/s/ Joseph C. Hashmall
18 Joseph C. Hashmall (*pro hac vice*)

19 ATTORNEYS FOR PLAINTIFF
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